NAGALINGAM P VELLUPILLAY v. PP

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN JCA
[CRIMINAL APPEAL NO: W-05-99-2011]
17 DECEMBER 2014

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in dangerous drugs – Exclusive access and control of premise where drugs found – Whether proof of possession of things found in premise – Allegation that wife also had access to premise – Whether negated guilt of accused – Whether both had joint possession*

CRIMINAL PROCEDURE: *Appeal – Conviction and sentence – Offence of trafficking in and possession of dangerous drugs – Non-exclusive custody and control of premise where drugs found – Whether negated guilt – Whether quantity consistent with possession for purpose of consumption – Whether conviction and sentence affirmed*

This was the appellant's appeal against his conviction and sentence for: (i) trafficking in dangerous drugs involving a total of 253.97g; and (ii) unauthorised possession of 14.84g of methamphetamine, offences under ss. 39B(1)(a) and 12(2) of the Dangerous Drugs Act 1952 ('DDA') and punishable under ss. 39B(2) and 39A(1) of the DDA respectively. The prosecution's case was that PW5 led a police party to carry out an arrest on the appellant in connection with a murder case. While proceeding to enter the house, which was not locked, PW5 saw the appellant coming out from a room located near the toilet, holding a transparent plastic packet in his left hand. The packet was later confirmed to contain 14.84g of methamphetamine, the subject matter of the second charge against the appellant. The drugs which were the subject matter of the first charge were found in different bags and packages in the room that the appellant came out from. The appellant's grounds of appeal were: (i) the drugs were in two locations but the High Court made only one finding; and (ii) the High Court had failed to consider the evidence that since SD2, the appellant's wife, had access to the drugs, a reasonable doubt arose in respect of exclusive custody and control. The crux of the defence was that the appellant did not have sole custody and control of the room in which the drugs were found.

Held (dismissing appeal; affirming conviction and sentence)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The drugs found in different bags and packages did not mean that they were found in such different locations as would necessitate separate scrutiny and appreciation. The different bags and packages were in the

same room. The substances in the bags and packages in the room were heroin and monoacetylmorphines as charged. There was nothing demonstrated of the difference in nature or circumstances as to require separate scrutiny and appreciation. If any drug was in a different location, it was the methamphetamine in the bag the appellant was found holding. For this drug, he was separately charged under the second charge, and which was addressed by the High Court. (paras 7 & 8)

(2) The relevance of exclusive access and control of a premise or room pertains to proof that he had possession of things found in the room. Whether he has possession of the things in the room is a finding to be made upon the particular facts and circumstances. The fact that another person has access to the room does not mean he cannot be held to be in possession of the drugs found in the room if such access is only, for example, in his presence. (para 24)

(3) The fact of non-exclusive possession does not negate guilt. Even if the submission that the appellant did not have exclusive access and control because his wife also had access were accepted, it would only mean that they both had joint possession. In any event, there was no evidence of access at the material time to the room let alone the substances containing the dangerous drugs by SD2. Her access to the drugs was purely speculative. (paras 25 & 26)

(4) The quantity of drugs was inconsistent with possession for the purpose of consumption. The paraphernalia for weighing, packaging and sealing in plastic packets point to no other object but to traffic in the substance containing the dangerous drugs. The fact that, while the appellant was the tenant of the room, neither he nor his wife and stepchildren had any clothes and personal effects there, underlined that the room was maintained at the material time as a storage and packaging location for the purpose of trafficking in the substances found therein. Hence, there was no error in the findings by the High Court. (para 27)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap sabitan dan hukuman bagi (i) pengedaran melibatkan dadah berbahaya sejumlah 253.97g; (ii) milikan tidak sah 14.84g methamphetamine, kesalahan-kesalahan di bawah ss. 39B(1)(a) dan 12(2) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum masing-masing di bawah ss. 39B(2) dan 39A(1) ADB. Kes pihak pendakwaan adalah bahawa PW5 mengetuai satu pasukan polis untuk melaksanakan penangkapan perayu berkaitan dengan satu kes pembunuhan. Semasa meneruskan untuk memasuki rumah tersebut, yang tidak berkunci, PW5 nampak perayu keluar dari sebuah bilik berhampiran dengan tandas, memegang satu bungkusan plastik lutsinar di tangan kirinya. Bungkusan tersebut kemudian disahkan mengandungi 14.84g methamphetamine, perkara pertuduhan kedua terhadap

perayu. Dadah-dadah yang menjadi perkara pertuduhan pertama didapati, dalam beg-beg dan bungkusan yang berlainan, dari dalam bilik di mana perayu keluar. Alasan-alasan rayuan perayu adalah: (i) dadah-dadah tersebut ditemui di dua tempat tetapi Mahkamah Tinggi membuat hanya satu dapatan; dan (ii) Mahkamah Tinggi telah gagal mempertimbangkan keterangan bahawa oleh sebab SD2, isteri perayu, mempunyai akses kepada dadah-dadah tersebut, keraguan munasabah berbangkit berkaitan dengan jagaan dan kawalan eksklusif. Intipati pembelaan adalah bahawa perayu tidak mempunyai jagaan dan kawalan tunggal bilik di mana dadah-dadah tersebut ditemui.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Dadah-dadah yang dijumpai dalam beg-beg dan bungkusan-bungkusan yang berlainan tidak bermaksud bahawa ia didapati di bahagian-bahagian yang jauh berbeza sehingga memerlukan penelitian dan pertimbangan yang berasingan. Beg-beg dan bungkusan-bungkusan yang berlainan tersebut berada dalam bilik yang sama. Bahan-bahan dalam beg-beg dan bungkusan-bungkusan dalam bilik tersebut adalah heroin dan monoacetylmorphines seperti yang dipertuduh. Tidak ada apa-apa yang menunjukkan perbezaan dalam bentuk atau hal keadaan yang memerlukan penelitian dan pertimbangan yang berasingan. Satu-satunya dadah di bahagian yang berlainan adalah methamphetamine dalam beg yang perayu dilihat memegang. Dia dipertuduh secara berasingan untuk dadah ini, di bawah pertuduhan kedua, dan ia telah dipertimbangkan oleh Mahkamah Tinggi.

(2) Kerelevanan akses dan kawalan eksklusif premis atau bilik adalah berkaitan dengan bukti bahawa dia mempunyai milikan barangan yang dijumpai dalam bilik tersebut. Sama ada dia mempunyai milikan barangan dalam bilik tersebut adalah dapatan yang perlu dibuat berdasarkan fakta atau hal keadaan tersebut. Fakta bahawa seorang yang lain mempunyai akses kepada bilik tersebut tidak bermaksud bahawa dia boleh diputuskan mempunyai milikan dadah-dadah yang ditemui dalam bilik tersebut, jika akses tersebut hanya, contohnya, dengan kehadirannya.

(3) Fakta milikan tidak eksklusif tidak menafikan kebersalahan. Walaupun penghujahan bahawa perayu tidak mempunyai akses dan kawalan eksklusif kerana isterinya juga mempunyai akses adalah diterima, ia akan hanya membawa maksud bahawa kedua-dua mereka mempunyai milikan bersama. Walau bagaimanapun, tidak ada keterangan akses kepada bilik tersebut dan lebih-lebih lagi kepada bahan yang mengandungi dadah berbahaya oleh SD2 pada masa material.

A **(4)** Kuantiti dadah-dadah adalah tidak konsisten dengan milikan bagi tujuan kegunaan. Alatan untuk menimbang, membungkus dan merekatkan bungkusan-bungkusan plastik menjurus kepada objek yang bukan lain selain daripada untuk mengedar bahan-bahan yang mengandungi dadah berbahaya. Fakta bahawa, walaupun perayu adalah penyewa bilik
B tersebut, dia atau isterinya atau anak-anak tirinya tidak mempunyai pakaian atau barangan milik peribadi di situ, menunjukkan bahawa bilik tersebut diuruskan pada masa material sebagai tempat penyimpanan dan pembungkusan bagi tujuan pengedaran bahan-bahan yang dijumpai di situ. Oleh itu, tidak ada kekhilafan dalam dapatan oleh Mahkamah
C Tinggi.

Case(s) referred to:
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
D *PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 CA* ***(refd)***
Romi Amora Amir v. PP [2011] 1 CLJ 870 CA ***(dist)***
Yap Chin Chai v. PP [2010] 4 CLJ 693 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 39A(1), 39B(l)(a), (2)

E *For the appellant - J Kuldeep Kumar; M/s J Kuldeep Kumar & Co*
For the prosecution - Aslinda Ahad; DPP

[Editor's note: For the High Court judgment, please see PP v. Nagalingam P Velupillay [2012] 1 LNS 485]

F *Reported by S Barathi*

JUDGMENT

Abdul Wahab Patail JCA:

G **[1]** The accused Nagalingam a/l P Vellupillay ("the appellant") appealed against his conviction and sentence for:

(a) trafficking in dangerous drugs involving a total of 253.97g (196.47g of heroin and 57.5g of monoacetylmorphines); and

H (b) unauthorised possession of 14.84g of methamphetamine,

offences under s. 39B(l)(a) of Dangerous Drugs Act 1952 punishable under s. 39B(2) of Dangerous Drugs Act 1952 and s. 12(2) of Dangerous Drugs Act punishable under s. 39A(1) of the Dangerous Drugs Act respectively.

I **[2]** This court dismissed the appeals and affirmed the conviction and sentence.

The Prosecution Case

[3] Briefly, the prosecution case was that on 2 February 2010 at about 3am, Insp Mohd Azri bin Mat Yussof ('PW5') led a police party to conduct a raid at a house bearing the address No. 6784A, Jalan Langkawi, Tai On Garden, Batu 4, Gombak, Kuala Lumpur, in respect of another offence. Upon arrival, PW5 found the front grill and wooden doors opened and the key to the front wooden door in the key hole of the lock at the centre of the door knob of the wooden door. While proceeding to enter the house with two of his men, PW5 saw the appellant coming out from a room located near the toilet. Introducing himself as a police officer, he saw that the appellant was holding a transparent plastic packet ('P22') in his left hand. Seizing the packet, PW5 found that it contained a substance he suspected to be a dangerous drug. The packet was later found to contain 14.84g of methamphetamine, the subject of the second charge.

[4] It is also the prosecution case that upon entering the room that the appellant came out from, PW5 found:

(a) a yellow coloured plastic bag, P24, on the floor (the "yellow bag") inside of which were:

  (i) three transparent plastic bags P25 (1-3) containing a pink coloured substance suspected to be a dangerous drug;

  (ii) one big transparent plastic bag (the "one big bag") P27 containing a green coloured substance suspected to be a dangerous drug;

  (iii) one small transparent plastic bag (the "one small bag") containing 80 packets P29 (1-80) in eight bundles containing pills suspected to be a dangerous drug.

(b) a black and white coloured paper bag, next to the yellow coloured plastic bag P24 above, bearing the brand "Quiksilver" (the "paper bag") inside of which were found two red coloured plastic bags, P32 and P34, inside each of which were a newspaper package P32A and P34A containing a pink coloured substance suspected to be a dangerous drug;

(c) three more plastic bags, P36, P38 and P40, on the floor, wrapped in newspapers, P36A, P38A and P40A, inside of each of which were plastic bags containing a big transparent plastic bag, P36B, P38B and P40B, each containing a substance which PW5 suspected to be heroin; and

(d) on the floor in the same room apparatus for sealing plastic bags (the "sealer"), P15, a balance, P16 and a package of empty transparent plastic packets, P17.

[5] PW5 issued a search list P19 to the appellant, detailing out the seized items and the location where they were situated at the time of their seizure.

A **The Grounds Of Appeal**

[6] The grounds of appeal were that:

(a) the drugs were in two locations but the High Court made one finding; and

B (b) the High Court failed to consider the evidence that since SD2, the wife of the appellant, had access to the drugs, a reasonable doubt had been raised in respect of exclusive custody and control.

Drugs In Two Locations

[7] That the drugs were found in different bags and packages does not C mean they were found in such different locations as would necessitate separate scrutiny and appreciation. The different bags and packages were in the same room. The substances in the bags and packages in the room were heroin and monoacetylmorphines as charged. There is nothing demonstrated of the difference in nature or circumstances as to require separate scrutiny and D appreciation.

[8] If any drug was in a different location, it was the methamphetamine in the bag the appellant was found holding. For this drug, he was separately charged under the second charge, and which was addressed by the High Court.

E **[9]** That aside, the two grounds are interlinked and we address the two grounds together.

[10] The submission began with trite law as to the physical and mental elements of possession (*Muhammed Hassan v. PP* [1998] 2 CLJ 170; *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; *PP v. Tan Tatt Eek & Other Appeals* F [2005] 1 CLJ 713; [2005] 2 MLJ 685) before coming to the submission that:

> ... It is our contention that the learned Trial Judge misdirected herself to consider both drug offences together in respect of the element of *mens rea*.

[11] Counsel relied upon *Yap Chin Chai v. PP* [2010] 4 CLJ 693; [2011] 2 MLJ 632 to submit:

G

> The learned trial judge had inferred knowledge of the drugs found in the room based on the fact that the complainant saw the Appellant coming out from the room where the drugs were found and the Appellant was holding a packet of drugs in his right hand. The learned trial judge did not separately consider as to whether the Appellant had known the H existence and content of the bags inside the room. The conduct of the Appellant by holding the packet of drugs and coming out from the 4th room cannot be inferred that the Appellant has knowledge of the drugs in the bedroom. There was a serious misdirection by the learned Trial Judge.

[12] The High Court had, in the prosecution case, found in respect of:

I (a) The second charge (pp. 13 to 14 of grounds of judgment):

> From the evidence which was given by the prosecution witnesses as set out, briefly, above, the court found that the prosecution had proved on a *prima facie* basis that the accused was found in physical

possession of the packet containing the 14.84 grammes of methamphetamine, the subject matter of the 2nd count, as he was holding it in his left hand when he was confronted by PW5 at 3.00 am on 2 February 2010 at the house which was rented by him from PW3. The accused clearly had custody and control of the packet. A

The court was also satisfied that the accused had *mens rea* possession of the drugs inside the packet because the packet was transparent. Therefore, the accused could see easily the contents of the packet which he was holding in his hand. Since the accused was holding the packet of drugs in his right hand and was walking out of a room of the 1st floor which he had rented from PW3 during the wee hour of the morning, the court drew the irresistible inference that the accused had manifested an intention to deal with the packet of drugs as if the packet of drugs belonged to him. The court was also satisfied that the irresistible conclusion was that the accused had knowledge that the packet contained dangerous drugs and that he had gone to the house to take the packet of drugs in the early hours of the morning in order to avoid detection of his illegal activities by his neighbours and also the police. B C D

[13] The thrust of the submissions in the appeal is in respect of the first charge where the High Court held (pp. 14 to 17 of grounds of judgment):

That also explained why the accused did not even bother to lock the grill door with a padlock and the front wooden door from inside the house as he would have reasonably assumed that no one would go to the premises at the material time. E

It was also inherently likely and probable that the accused must also have been in a hurry to get the packet of drugs from inside the premises and to leave the premises quickly as he had left the house keys hanging outside the house with one of the keys still stuck to the knob of the front wooden door and both the doors open to facilitate his speedy exit. He certainly did not expect the police to conduct the raid on the premises at that time. F

According to the complainant, he had stumbled upon the accused and the drugs in his raid on the house because he had led the police party to carry out an arrest on the accused in connection with another case, ie, a murder case, and not based on information concerning the presence of drugs in the house. G

As for the large quantity of drugs which formed the subject matter of the first charge, the court was satisfied that he also had *mens rea* possession of the drugs because they were found inside the room from where the complainant had seen the accused coming out earlier. The drugs could be easily seen by the complainant after he had opened up the plastic bags and the same would have applied to the accused. H

There were also drugs already packed into several smaller transparent plastic packets and tied up with rubber bands. Packed in that manner it could not be said that the drugs were for his consumption. The only I

A inference to be made by the court is that they were for sale and distribution to consumers of the drugs. There were also paraphernalia used to weigh, package and seal the drugs such as the balance, the sealer and the transparent empty plastic packets. The only inference which the court could make was that the accused was trafficking in the substantial quantity of drugs at the material time within the meaning of the word
B "trafficking" as defined in s. 2 of the DDA and that he was conveniently using that room in the 1st floor which he had rented for his drug trafficking activities since his wife and child were staying elsewhere.

...

C The court, therefore, ordered the accused to make his defence to the 2 counts in order for him to rebut the prosecution case and the presumption of "trafficking" on the balance of probabilities and also to explain the prosecution case failing which the court would find him guilty, convict him and impose the sentences as provided in the 2 sections on him (see the cases of *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89 and *PP v. Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393).
D

[14] The passage of the grounds of judgment taken to task is at p. 3 of the grounds of judgment where under the subject of *mens rea* possession, the High Court stated:

E Since the 1st ingredient of both the 2 counts, ie, the accused was found in *mens rea* possession of the dangerous drugs is common to both the counts, the court shall deal with the 1st ingredient in relation to both the counts.

[15] Relying upon *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC, it was submitted that since there are three people who had access to the said house namely the appellant himself, his wife (SD2 Thenmoly
F a/p Satiyel) and the person whom the appellant sub-rented the house, Ah Soon, it was a misdirection for the High Court to deal with possession of the substance in the package found in the appellant's hands together with the substances the subject of the first charge found in the room. Driving home the point, it was submitted:

G The question put to the Appellant was whether the drugs in the 4th bedroom belonged to the Appellant. The prosecution failed to prove that he knew there were drugs inside the 4th room. The prosecution did not put any question to the SP5 as to whether the Appellant could have seen the plastic bags as SP5 was the first person who entered the house.

H My Lords, there was a misdirection by the learned Trial Judge on the finding that the Appellant have the *mens rea* without evidence that he could have seen the presence of the drugs or he could have known the content of the plastic bags.

[16] In *Romi Amora Amir v. PP* [2011] 1 CLJ 870, it was held that because
I the prosecution had failed to establish that the appellant knew the package was under his seat, it would naturally follow that he would not know the contents. That case concerned a package containing cannabis found under the

driver's seat of the taxi the appellant drove and came out from. It was a small amount. It could possibly be placed or inserted by any passenger sitting in the rear passenger seat. Witness PW3 testified that he rented the taxi from the owner, and the appellant had borrowed the car from him. He further testified he did not find any plastic bag inside the taxi when it was sent for cleaning at the car wash centre.

[17] In the instant case, the yellow coloured plastic bag, the black and white paper bag and the three plastic bags, P36, P38 and P40, together with paraphernalia for weighing and packaging were on the floor of the room upon which there was a specific finding not appealed against that it was used as a storage place by the appellant. As found by SP5, it was in plain view on the right when he entered the room the appellant had immediately before came out from. Though the drugs were different from the drugs he was found holding, they are common drugs being trafficked. Also not appealed against were the findings that:

> The accused's wife gave evidence which was consistent with and corroborated the evidence of the accused. She said that the accused had sublet the premises to a male Chinese. She had met the male Chinese 2 to 3 times at the premises prior to the accused subletting the premises to him but she did not know the name of the male Chinese.
>
> The court noted that the accused's wife was present in the court room while the prosecution witnesses were giving evidence against the accused. Since she was only aged 30 years old at the time she testified in court in the Tamil language and she is a Malaysian citizen it would be reasonable to infer that she would be able to understand simple Malay which was used by the prosecution witnesses in their oral testimonies.
>
> The prosecution witnesses had testified in Malay concerning the police raid at the premises and the detention and arrest of the accused at the material time with the incriminating plastic packet in his hand and the recovery by the police of the newspaper and plastic packages containing dangerous drugs. ...
>
> The court noted that the accused's wife had tried very hard to give evidence which was consistent with the accused's evidence. Although she was a competent witness to testify for the defence, the court had to evaluate her evidence with great care and caution bearing in mind that she was also an interested witness being the wife of the accused and that she, a full time housewife, and her 2 step-children were wholly dependent on the accused for financial support.
>
> The accused's wife also sought to raise a doubt that the dangerous drugs could have belonged to the accused's older brother who was residing in the 4th room which was situated nearest to the kitchen before the premises were sublet to Ah Soon.
>
> However, the court rejected the accused's defence that he had sublet the premises to Ah Soon, that he had gone to the premises after receiving a phone call from Ah Soon, that he did not know that the contents of the

A packet which he was holding in his hand and the contents of the newspaper and plastic packages which the complainant recovered from inside the 4th room were dangerous drugs and that the dangerous drugs did not belong to him but to Ah Soon.

The reason is because the court was satisfied that Ah Soon was a
B fictitious person, that the existence of Ah Soon was deliberately concocted by the accused and his wife to exculpate him from the 2 counts preferred against him. Furthermore, the accused did not give any reason to the court why Ah Soon would wish to frame him in that manner knowing that the accused would be sentenced to death if the accused was found guilty and was convicted by the court.

C **[18]** For the foregoing reasons, we find *Romi Amora Amir v. PP* [2011] 1 CLJ 870 distinguishable.

[19] We observe that in the cross-examination to a question put to him, SP5 replied (RR1:48):

D (Rujuk P6). Tak setuju kesemua barang-barang ini tidak di jumpai dalam bilik.

[20] In his testimony on oath, the appellant said he went to the premises after Ah Soon called him. He testified:

E Apabila sampai saya nampak pintu rumah terbuka. Saya pun masuk dan cari Ah Soon. Saya panggil dia. Saya terus pergi ke bilik No. 4 yang saya sewa kepada dia. Saya pergi ke tandas dan cari dia. Dia tidak ada. Saya dapat 1 bungkus di lantai di lorong.

Saya pun ambil dan terus ke ruang tetamu. Tiba-tiba ada banyak orang
F yang ada di depan pintu.

[21] He did not say the plastic and paper packages of substances containing the dangerous drugs were not there. Instead, in cross-examination, he said (RR1:132):

Tak setuju dadah yang dijumpai dalam bilik ialah kepunyaan saya dan
G bukan kepunyaan Ah Soon.

[22] The crux of the defence is that the appellant did not have sole custody and control of the room in which the drugs were found. It was submitted that the High Court erred when it failed to accept that because SD2, Thenmoly a/p Satiyel, the wife of the appellant, had access to the drugs, a reasonable
H doubt had been established.

[23] From the foregoing, the finding was a finding of fact on the evidence.

[24] Furthermore, the relevance of exclusive access and control of a premise or room pertains to proof that he had possession of things found in
I the room. Whether he has possession of the things in the room is always a finding to be made upon the particular facts and circumstances. That another

has access to the room does not mean he cannot be held to be in possession of the drugs found in the room if such access is only, for example, in his presence. The idea of exclusivity was explained in *PP v. Denish Madhavan* [2009] 2 CLJ 209 FC, where the Federal Court held:

> [16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about "exclusive" possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, – that is, "exclusive" – that a conviction is possible. When the learned trial judge said "The accused sought to negative the proof of exclusive possession...", we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.
>
> [17] The idea of exclusivity features in the meaning of "possession" in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v. Reg.* [1955] 1 LNS 53:
>
> > ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
> >
> > Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.
>
> [18] Thomson J, in *Chan Pean Leon v. PP* [1956] 1 LNS 17, said that "possession" for the purposes of criminal law involves possession itself – which some authorities term "custody" or "control" – and knowledge of the nature of the thing possessed. As to possession itself, he cited the following definition in *Stephen's Digest* (9th edition, p. 304), in which the exclusive element mentioned by Taylor J appears:
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

A [19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[25] Thus, that fact of non-exclusive possession does not negate guilt. Even if the submission that the appellant did not have exclusive access and control B because his wife also had access were accepted, it would only mean on the facts of this case that they both had joint possession. The High Court considered the defence that the appellant's wife, SD2 had access and held:

The court also believed and accepted the evidence of PW2 that he had taken the plumber to the premises to repair the plumbing upon a complaint C lodged by the accused and he had seen the accused in the premises. PW2 did not see the accused's wife and step children in the premises.

The police also did not find any personal belongings of the accused's wife and 2 step children in the premises. Hence the accused's version that they had stayed with him in the premises before they had moved to their D present address could not and might not have been reasonably true. It was more likely that if they were staying there it was in the month of October as testified by PW3.

Be that as it may, at the time of the police raid at the premises the accused's wife and his 2 step children were not residing in the premises. The photographs taken at the premises showed that the kitchen was E devoid of any kitchen equipment, cooking utensils, crockery and cutlery.

[26] There was no evidence of access at the material time to the room let alone the substances containing the dangerous drugs by SD2. Her access to the drugs is purely speculative.

F **Other Observations**

[27] We observe that the quantity of drugs is inconsistent with possession for the purpose of consumption. The paraphernalia for weighing, packaging and sealing in plastic packets point to no other object but to traffic in the substance containing the dangerous drugs. The fact that while the appellant G was the tenant of the room, neither he nor his wife and step-children had any clothes and personal effects there underlines that the room was maintained at the material time as a storage and packaging location for the purpose of trafficking in the substances found therein. We find no error in the High Court holding:

H The court was of the view that the accused had rented the premises to engage in his drug trafficking activities unknown to PW2 and PW3. The court did not believe the accused that he was working as a security guard at the material time. If he was working as a security guard he would not have been able to afford to pay the rental for the premises which he had I rented from PW3 and also the rental for the premises occupied by his wife

and his 2 step-children in Hot Spring, Setapak. Therefore, the court was satisfied that he had concocted the character of Ah Soon in order to shift the culpability for the drugs to Ah Soon and to show that Ah Soon was paying a monthly sum of RM600.00 to him as rental for the premises.

[28] We, therefore, dismissed the appeals and affirm the conviction and sentence on both charges.